Supreme Court of the United States

OCTOBER TERM, 1940.

No. .....

IRVING POTASH, JOSEPH WINOGRADSKY, USERATOS VAFIADES and LOUIS HATIOS,

Petitioners,

against

UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Court Below.

The opinion has not yet been reported. It appears at R. 843.

II.

Jurisdiction.

1.

The statutory provision is Jud. Code, Sec. 240(a) (28 U. S. C., Sec. 347, as amended by the Act of Feb. 13, 1925, 43 Stat. 938).

2.

The date of the order for mandate was March 26, 1941 (R. 849).

III.

Abstract of Case.

Petitioners were convicted of violating Section 88 of Title 18 U. S. C. (Act of March 4, 1909), which is as follows:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both."

The offense against the United States which petitioners allegedly conspired to commit is prescribed by 18 U. S. C. 241 (Act of March 4, 1909), which provides as follows:

> "Whoever corruptly, or by threats or force, or by any threatening letter or communication, shall endeavor to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or officer acting as such commissioner, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or officer acting as such commissioner, in the discharge of his duty, or who corruptly or by threats or force, or by any threatening letter or communication, shall influence, obstruct, or impede, or endeavor to influence, obstruct, or impede, the due administration of justice therein, shall be fined not more than $1,000, or imprisoned not more than one year, or both."

The pending case in which petitioners were alleged to have intimidated witnesses was an anti-trust case prosecution of the Needle Trade Workers Industrial Union and various individuals associated with it. The petitioners Potash and Winogradsky were defendants in that case. (Their conviction was reversed by the Circuit Court of Appeals (*U. S.* v. *Gold*, 115 F. 2d 236) and the indictment was thereafter dismissed.) The other two petitioners were merely union members.

Petitioners were charged with having conspired to corrupt witnesses in the anti-trust case.

On the trial of the case at bar one Loukas, who was engaged in a struggle against the union, testified as to attempts made by petitioners Potash and Vafiades to get him to leave the country before the trial of the anti-trust case, and a threat by petitioner Winogradsky. Petitioner Hatios, according to the Government's proof, warned one Tsaras not to "go against" Ben Gold, a defendant in the anti-trust case. Tsaras was not called as a witness for the Government in that case. No connection was shown between the acts of petitioner Hatios and those of the other petitioners, except that all belonged to the same labor union. The Circuit Court of Appeals held that Hatios was in the same conspiracy with the other petitioners because "It is most probable that he would not have done so unless inspired by those who were defendants (in the anti-trust case)" (R. 846), even though Gold, whom he was trying to protect, was acquitted in the case at bar of having conspired with him. Nor did the Circuit Court find a fatal variance, though the opinion contains no discussion of the point.

Loukas, the principal Government witness, was permitted on direct examination to testify as to a prior statement he had made to Federal Bureau of Investigation officials, which he said was the same as his testimony on the stand.

This was a clear violation of the long established rule that corroboratory statements are admissible only when the issue of fabrication has been raised. *Ellicott* v. *Pearl*, 10 Pet. 412 (U. S. 1836). The Circuit Court of Appeals recognized the rule but held that its violation did not require reversal because "If the jury believed his testimony, such corroboration added nothing; if they did not, it could not have changed their minds" (R. 848). This is true in every case, and the rule is thus wholly nullified.

I.

The plea of former jeopardy should have been sustained.

At the first trial the jury was discharged during their deliberations. The docket entry shows merely that on June 28, 1940 "At 12:45 P. M. the jury is discharged and mistrial ordered" (R. 7). The stenographic record which was attached to the plea of former jeopardy interposed by the defendants at the commencement of the second trial shows that eleven jurors returned to the court room without reporting a verdict or a disagreement, and the Court on its own motion and without the request or consent of defendants' counsel, and without stating any reasons or making any judicial inquiry, discharged the jury with thanks, stating that he felt "very badly about the outcome of this" (R. 18). When the defendants interposed their plea on being placed on trial a second time the plea was summarily overruled by the Court (R. 48, 22) with an exception to all defendants (R. 48). In opposing the plea the Government counsel merely stated that "There was no final adjudication to the previous trial; consequently no

former jeopardy. . . . We feel that the discharge of the jury was entirely within the discretion of the Trial Court" (R. 47-48). The overruling of the plea of double jeopardy was assigned as error (R. 819).

In *U. S.* v. *Perez*, 9 Wheat. 579 (1824), Mr. Justice Story laid down the rule that courts may discharge juries when there is a "manifest necessity" so to do, saying that "it is impossible to define all the circumstances, which would render it proper to interfere", but that "the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes" (p. 579). This case has always been followed. *Keerl* v. *State of Montana*, 213 U. S. 135, 137 (1909).

The question as to what constitutes "manifest necessity" has arisen for decision by appellate courts whenever a defendant has appealed from a judgment of conviction at a second trial, at which he pleaded former jeopardy by reason of an improper discharge of the jury at the first trial. In these cases the appellate court has had to determine *from the record* whether "manifest necessity" existed. The cases will be found collected in *Cornero* v. *U. S.*, 48 F. (2d) 69 (C. C. A. 9, 1931), *U. S.* v. *Giles*, 19 F. Supp. 1009 (W. D. Okla. 1937), and (Note) 38 A. L. R. 706. It would serve no purpose to analyze these cases to ascertain what is "manifest necessity" and what is not, since the record at the first trial is silent as to the reason for the discharge.

Under these circumstances the authorities hold that the appellants must be regarded as having been put twice in jeopardy.

In the absence of Federal authorities, resort must be had to the common law (*Hanley* v. *U. S.*, 123 Fed. 849 (C. C. A. 2, 1903)), or according to some Federal courts, to the common law of the state where the case is tried, as

modified by statute. (*Avila* v. *U. S.*, 76 F. (2d) 39 (C. C. A. 9, 1935); *U. S.* v. *Olmstead*, 7 F. (2d) 756 (N. D. Wash., 1925); *U. S.* v. *Eagan*, 30 Fed. 608 (E. D. Mo., 1887).)

According to the general common law, there is double jeopardy if it appears that the jury was discharged at the first trial without the reason for discharge appearing on the record. Not only does the legal effect of the circumstances constituting the reason for the discharge determine whether the prosecutor may put the defendant again on trial, but the absence of record would foreclose review as to whether "manifest necessity" existed, thus fostering "an absolute and uncontrollable, instead of a legal discretion" (*Poage* v. *State*, 3 Ohio St. 229, at p. 240 (1854)).

In New York the common law rule has been codified in Section 429 Crim. Code, which provides:

> "Whenever the jury is discharged without a verdict, the reason for the discharge must be entered on the minutes."

Cf. *Peo.* v. *Barrett*, 2 Caines 304 (N. Y., 1805).

The common law rule is of long standing and well established. A typical statement of it is found in *State* v. *Allen*, 59 Kan. 758, 760, 54 Pac. 1060 (1898):

> "In this case it is contended that one of the recognized statutory grounds or necessities for discharge appears—that is, the inability of the jury to agree; and if we could look beyond the record a basis for this contention might be found. The rule, however, in cases involving the liberty of the citizen, and especially in cases of felony, is that the essential facts upon which the discharge is based, and the finding of the court thereon, must be entered of record; and unless the record shows the existence of such facts and the decision of the court thereon, and that they constitute sufficient ground for discharge,

the defendant cannot again be put on trial for the same offense."

Other cases to the same effect are *State* v. *Jefferson,* 66 N. C. 309 (1872); *Peo.* v. *Parker,* 145 Mich. 488, 108 N. W. 999 (1906); *Ex parte Maxwell,* 11 Nev. 428 (1876); *Wright* v. *State,* 35 Tex. Crim. Rep. 158, 32 S. W. 701 (1895); *State* v. *Klauer,* 70 Kan. 384, 78 Pac. 802 (1904); *State* v. *Bilton,* 156 S. C. 324, 153 S. E. 269 (1930); *State* v. *Wiseman,* 68 N. C. 203 (1873); *State* v. *Leunig,* 42 Ind. 541 (1873); *Mitchell* v. *State,* 42 Ohio St. 383 (1884); *State* v. *Smith,* 44 Kan. 75, 24 Pac. 84 (1890); *Poage* v. *State,* 3 Ohio St. 229 (1854); *Dobbins* v. *State,* 14 Ohio St. 493 (1863).

That the failure to object was not a waiver, see: *U. S.* v. *Watson,* 28 Fed. Cas. 16,651 (S. D. N. Y., 1868); *Ex Parte Glenn,* 111 Fed. 257 (C. C. W. Va., 1901), rev'd on other grounds, 189 U. S. 506 (1902); *Peo. ex rel. Stabile* v. *Warden,* 139 App. Div. 488, aff'd 202 N. Y. 138 (1911); *Cliett* v. *State,* 167 Ga. 835, 147 S. E. 35 (1929); *State* v. *Richardson,* 47 S. C. 166, 25 S. E. 220 (1896); *Mullins* v. *Comm.,* 258 Ky. 529, 80 S. W. (2d) 606 (1935); *Hipple* v. *State,* 191 S. W. 1150 (Texas Ct. App., 1917).

The Circuit Court of Appeals (R. 844) purported to find the reason for the jury's discharge in the record, stating "The inference is obvious that the mistrial was ordered because one of the jurors had become incapacitated to continue with the case before the jury had completed its deliberations", drawing this inference from the fact that the record shows that eleven jurors returned to the courtroom. Such an inference is wholly speculative. The juror may have been incapacitated and he may not.

While serious illness of a juror or other compelling urgency may, under certain circumstances, establish a manifest necessity for the discharge of a jury, the court must

judicially ascertain the nature, extent and seriousness of the illness and judicially determine whether it sufficiently warrants the discharge of the jury. To make such a finding the record must clearly show such facts. The defendant has a stake in such ascertainment and determination. The Court cannot arbitrarily determine such a question, *ex parte,* or without making a record.

Again, the Circuit Court of Appeals found that the petitioners had failed to sustain the burden of proof of their plea. While defendants of course have the burden of showing that no "manifest necessity" existed for the discharge of the jury where the facts are known, they could not conceivably have such burden where the reason for the discharge was not disclosed to them.

II.

The proof adduced was of two separate conspiracies and there was a fatal variance.

The petitioners contended below that, taking the evidence most favorably to the Government, the proof showed three distinct conspiracies, one between the petitioners Potash and Vafiades, one in which petitioner Winogradsky conspired, if at all, with persons unknown, and one in which petitioner Hatios conspired with defendant Gold. In order to make the point clear without too long an exposition, we call attention only to the testimony against Hatios. It will be recalled that he was not a defendant in the anti-trust case, and his only connection with the defendants in that case was that he belonged to the same union. The Government's evidence against him was that he told a prospective witness in the anti-trust case who was confined to Ellis Island that he could get out on bail if he would "do what Ben Gold says" (R. 411). The witness's fiancee

said that petitioner Hatios told her to influence the prospective witness "not to go against Ben Gold . . . and if he says anything in this court he will be marked as an informer down at the market" (R. 451, 452). Ben Gold was a defendant in the anti-trust case and also in the case at bar. In the case at bar he was acquitted.

Petitioners therefore contended below that the conspiracy between Hatios and Gold, if there was one, was necessarily a separate and distinct conspiracy from that between the other petitioners; and petitioners urged that this was a fatal variance, and that the rule of *Berger* v. *U. S.*, 295 U. S. 78 (1934), did not apply. In that case this Court held that proof of two separate conspiracies was not a fatal variance if there was a common member of each. There Rice, Katz, Berger and Jones were indicted for conspiracy to utter counterfeit bills. Rice, who was the engraver, conspired with Katz to utter the false bills to buy rings from persons advertising them for sale. Berger, unknown to Rice, approached Katz and introduced to him Jones who passed the bills to tradesmen. There were thus two conspiracies of which Katz was the common member. This Court in holding that there was no fatal variance called attention to the fact that "the only connecting link between the two was that Katz was in both conspiracies and the same counterfeit money had to do with both" (p. 80).

In the case at bar there was no connection whatever between the petitioner Hatios and the other petitioners, except that they belonged to the same union. As to this, as was pointed out to the Court below, Section 6 of the Norris-LaGuardia Act, 47 Stat. 71, 29 U. S. C. 106, provides:

> "No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United

> States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof."

The Circuit Court of Appeals did not discuss the Berger case because they found Hatios to be in the same conspiracy as the other defendants. They said: "As to Hatios the case is less clear; but it is pertinent to ask why he had busied himself in endeavoring to suppress testimony in a prosecution in which he was not a defendant. It is most probable that he would not have done so unless inspired by those who were defendants" (R. 846). We submit that this holding not only extends the rule of the Berger case to conspiracies of which there is no common member, but that it convicts petitioner Hatios by an inference which must be based on the proposition that he is guilty until he is proved innocent. The Circuit Court of Appeals in effect held that one who endeavors to suppress testimony in a criminal case to which he is not a party is automatically guilty of conspiracy with all the defendants in that case without other proof. This is contrary to the doctrine of this Court laid down in *U. S.* v. *Falcone,* 311 U. S. 205 (1940). If Hatios was not in the same conspiracy, there is a variance which was necessarily and obviously prejudicial.

Moreover, if Hatios was in a conspiracy at all, he conspired with the acquitted defendant Gold. The conviction of one defendant cannot be sustained if the other party to the conspiracy was acquitted. *United States* v. *Austin-Bagley Corp.,* 31 F. (2d) 229 (C. C. A. 2, 1929); *Feder* v. *United States,* 257 Fed. 694 (C. C. A. 2, 1919).

It is submitted that the reasoning by which Hatios was found by the Circuit Court of Appeals to be a co-conspira-

tor is violative of the presumption of innocence. He could in fact have conspired only with Gold, who was acquitted. His conspiracy had no common member with the other conspiracy, and the rule of the *Berger* case cannot be extended to him.

III.

An important rule of evidence has been nullified.

On the direct examination of the Government witness Loukas, he was asked whether during the anti-trust trial he went to the Federal Bureau of Investigation and made "a 15 or 16 page statement which set out all the facts or practically all the facts which you testified to here today" (R. 110). Objection was overruled and exception taken (R. 111). Again at R. 111 he was asked whether on March 21, 1940, during the anti-trust trial he sat down with an F. B. I. agent and set out in detail everything that took place from February 5 to March 20. Objection was overruled and exception taken. He was then asked, likewise over objection and exception, whether he went back to the Federal Bureau of Investigation, read his statement and put his name on the bottom of every page and signed the last page (R. 112). Finally, he was asked whether he had from time to time before he took the witness stand in the case at bar read through a copy of the statement to refresh his recollection (R. 113). He answered that he had. The statement itself was offered and excluded (R. 114), but the inescapable inference was left that it was the same as the testimony which the witness had just given (R. 110).

Ever since *Ellicott* v. *Pearl,* 10 Pet. 412, 438 (1836), it has been the rule that where a witness's testimony is, in the words of Mr. Justice Story, "assailed as a fabrication

of a recent date, * * * in order to repel such imputation, proof of the antecedent declaration of the party may be admitted". *Boykin* v. *United States,* 11 F. (2d) 484 (C. C. A. 5, 1926); *Robb* v. *Hackley,* 23 Wend. 50 (N. Y., 1840); *Yoder* v. *U. S.,* 71 F. (2d) 85, 87 (C. C. A. 10, 1934). The Circuit Court of Appeals found that this rule had been violated in the instant case, but that the error was not sufficiently prejudicial to justify reversal (R. 848). We call particular attention to the reasoning of the Court which said:

> "If the jury believed this testimony, such corroboration added nothing; if they did not, it could not have changed their minds."

It is always the case that if the jury believes the testimony in chief of the witness, corroboration adds nothing. If this new rule is applied, there will be no case where improper corroboration of a witness who has not been attacked will be prejudicial error. All sorts of corroboration will be adduced to support witnesses on direct examination, because the answer may always be made that perhaps the jury believed his story without the corroboration. A new rule has thus been laid down in the Second Circuit, which nullifies the rule of *Ellicott* v. *Pearl, supra.*

The Court, in the exercise of its supervisory powers, should grant a writ of certiorari to review and reverse the decision of the Circuit Court of Appeals for the Second Circuit.

Respectfully submitted,

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